

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

DOCKET NOS. 2016-41-E AND 2016-42-E – ORDER NO. 2018-__

March __, 2018

IN RE: Power Purchase Agreement between)	
Duke Energy Progress, LLC and Olanta)	
Solar, LLC)	
Commission Docket No. 2016-41-E)	PROPOSED ORDER
	DENYING REQUEST FOR
	CONFIDENTIAL
And)	TREATMENT OF
	PURCHASED POWER
Purchase Power Agreement Between)	AGREEMENT
Duke Energy Progress, LLC and Dillon)	AMENDMENTS
Solar, LLC)	
Commission Docket No. 2016-42-E)	

I. INTRODUCTION

This matter comes before the Commission on a request of Duke Energy Progress, LLC (“Company” or “DEP”) to grant confidential treatment to two Purchase Power Agreement (“PPA”) amendments. On January 29, 2016, DEP filed two separate PPAs, one between itself and Olanta Solar, LLC (“Olanta”) and the other between itself and Dillon Solar, LLC (“Dillon”). The Company filed both PPAs pursuant to Public Service Commission of South Carolina (“Commission”) Order Nos. 81-214 and 85-347. In each filing, the Company requested that it be permitted to file the confidential version of the PPAs under seal to be maintained as confidential pursuant to Commission Order No. 2005-226. According to the Company, the PPAs contain proprietary and commercially sensitive pricing information that, if disclosed, could adversely affect the Company’s ability to provide least cost resources for its customers.

On February 5, 2016, the South Carolina Office of Regulatory Staff (“ORS”) filed two letters with the Commission, one regarding the DEP and Dillon PPA and the other regarding the DEP and Olanta PPA, each stating that ORS had reviewed the Company’s filing and had no objection to DEP’s request.

On February 24, 2016, the Commission issued Order Nos. 2016-146 and 2016-147, which accepted for filing the PPAs between DEP and Olanta and DEP and Dillon, respectively. In each of those orders, the Commission also granted the Company’s request for confidential treatment of the PPAs.¹

On October 5, 2017, the Company filed a cover letter and an amendment to each PPA. In the Company’s requests, it stated that each amendment contained commercially sensitive and proprietary information, and as a result, the Company requested that pursuant to S.C. Code Ann. § 30-4-40(a), certain provisions of each amendment be exempt from disclosure under the Freedom of Information Act (“FOIA”), S.C. Code Ann. §§ 30-4-10 *et seq.* and 10 S.C. Code Ann. Regs. 103-804(S)(1). The Company included with its letter a redacted version of the PPA amendment, attached hereto as Order Exhibit No. 1.

On October 24, 2017, ORS filed a letter with the Commission stating that it objected to the Company’s request for confidential treatment of certain provisions of the PPA amendment. According to ORS’s letter, the Company requested confidential treatment for portions of the amendment including, but not limited to, headers, column labels, and definitions. ORS took the position that not all the redacted items were commercially sensitive and proprietary in nature. As

¹ According to Commission Order Nos. 2016-146 and 2016-147, the Commission granted “Confidential Treatment to the Agreement which the Company asserts contains proprietary and commercially sensitive pricing information that is entitled to protection under the South Carolina Freedom of Information Act.”

a result, ORS objected to the request that each be treated as confidential unless and until the Company demonstrated why the redacted portions were confidential and exempt from disclosure.

On December 4, 2017, the Company submitted a memorandum in support of its position along with a revised redacted PPA amendment, which is attached as Order Exhibit No. 2. The memorandum also indicated that a solar developer, Innovative Solar Systems, LLC (“Innovative”) submitted a FOIA request to ORS seeking the production of the two PPA amendments for which the Company seeks protection.

On December 5, 2017, ORS filed a letter providing additional support for its position that the PPA amendments should be disclosed to the public.

On December 13, 2017, the Company filed a letter in response to ORS’ letter of December 5, 2017 in which the Company restated its request that the Commission protect these PPA amendments from public disclosure.

On December 20, 2017, the Commission issued Order No. 2017-761, which required that the un-redacted copies of each PPA amendment remain sealed for the present and Ordered the Commission Staff to schedule oral arguments regarding the confidentiality of the PPA amendments.

Oral arguments were held regarding the Company’s request for confidentiality of each PPA amendment on February 6, 2018, before this Commission with the Honorable Swain E. Whitfield presiding as Chairman. Representing the Company before the Commission in these dockets was Frank R. Ellerbe, III, Esquire. Jeffrey M. Nelson, Esquire appeared for ORS.²

² Neither Counsel for Dillon nor Olanta intervened in this matter.

II. POSITION OF PARTIES

Dep's Position

Through its filings and its oral argument before the Commission, the Company asserts two principal arguments as to why the Commission should grant the PPA amendments confidential treatment. First, the Company asserts that granting its request for confidentiality aligns with previous Commission decisions. Second, the Company asserts that the information contained in the PPA amendments has commercial value and that releasing these documents to the public could enhance the negotiating position of Qualifying Facilities ("QF"); therefore, the Commission is justified in withholding these PPA amendments from the public.

In support of the Company's first assertion, it states that the Commission's rulings in Order Nos. 2016-146 and 2016-147 were consistent with other rulings by the Commission in similar matters and consistent with the policies of the Commission encouraging utilities to negotiate individual contracts with QFs under the Public Utility Regulatory Policies Act of 1978 ("PURPA"). The Company cites 330 Concord Street Neighborhood Association v. Campsen, 309 S.C. 514, 424 S.E.2d 538 (1992), where the South Carolina Supreme Court held that an administrative agency acts arbitrarily when it departs from established precedent without a substantial reason to do so. According to the Company no reason has been presented to the Commission that justifies a change in its practice of protecting the confidentiality of negotiated agreements between the Company and QFs under PURPA. According to the Company, any customer who wishes to access filed confidential documents in a docket merely needs to file a Petition to Intervene with the Commission and sign a non-disclosure agreement with the Company.

Additionally, the Company cited Commission Order No. 2007-70, where in exercising its discretion, the Commission ruled that certain material could be protected where that material

provided detailed information concerning Duke Energy Carolinas' business and practices and was sensitive. That Order went on to state:

The South Carolina Freedom of Information Act ("FOIA") allows exemption from disclosure proprietary business information that meets a definition of "trade secrets." S.C. Code Ann. Section 30-4-40(a)(1) states that matters which may be exempt from FOIA include: "(1) Trade secrets, which are defined as unpatented, secret, commercially valuable plans, appliances, formulas, or processes. Trade secrets also include, for those public bodies who market services or products in competition with others, feasibility, planning, and marketing studies, marine terminal service and nontariff agreements, and evaluations and other materials which contain references to potential customers, competitive information, or evaluation."

Order No. 2007-70, at pp. 2-3.

The Company also cited Commission Order No. 1981-214 where the Commission determined that it was in the public interest for electrical utilities and QFs to negotiate contracts for the purchase of power pursuant to PURPA. The Company stated that if the Commission were to release these PPA amendments to the public, it would impact the Company's ability to negotiate different terms with different counterparties. Therefore, the Company stated that making the contracts public would result in making them non-negotiable and conflict with the Commission's intent to encourage utilities and QFs to negotiate contracts.

The Company also states that a ruling in which the Commission grants the Company's request for confidentiality is consistent with Commission Order No. 1991-272, issued in Docket No. 90-425-E. The issue referred to in that case dealt with the confidentiality of coal contracts. In that case, the Company had witnesses testify that public disclosure of the coal supply and transportations contracts would increase the cost of fuel for electric companies in the jurisdiction and that ultimately, customers would pay higher rates. On appeal, the South Carolina Supreme Court affirmed the position taken by the Commission to protect the confidentiality of coal contracts. The Company argues the Commission's decision to protect the disclosure of coal and

coal transportation contracts is equally appropriate for the contracts for the purchase of solar energy. Accordingly, the Company argued the Commission's practice of protecting the confidentiality of these contracts is an appropriate balance of the Commission's oversight role with the need to protect the ability of the utilities to negotiate individualized terms of contracts with QFs for the most advantageous contract, which in turn benefits the customers. Accordingly, the Company argues that the public's interest to these documents has not changed since the Commission determined that utilities should be encouraged to negotiate individual contracts with QFs nor has it changed since the Commission decided that coal contracts should be granted confidential treatment; therefore, these contracts should be granted confidentiality.

In support of the Company's second assertion, the Company argues that a request made by Innovative to obtain the PPA amendments pursuant to a FOIA request demonstrates that the terms of negotiated PPAs have commercial value and that QFs believe that access to those terms will enhance the QF's negotiating position with DEP. The Company argues that the resulting potential shift in negotiating dynamics underscores the need to grant the request of confidentiality. The Company also stated that the fact that Innovative has, as of December 4, refused to directly address the DEP request for confidentiality, but rather sought the document from ORS is significant.

ORS's Position

ORS argued in favor of making the PPA amendments available to the public. ORS asserts that while a previous Commission Directive cites S.C. Code Ann. § 58-4-55(C) as governing statute, it is FOIA that governs the Company's request, and as a result, the sections in South Carolina Code Title 30, Chapter 4 should be looked to in determining the proper outcome. According to S.C. Code Ann. § 58-4-55(C):

Any public utility that provides the regulatory staff with copies of or access to documents or information *in the course of an inspection, audit, or examination that is not part of a contested case proceeding* may designate any such documents or information as confidential or proprietary if it believes in good faith that such documents or information would be entitled to protection from public disclosure under the South Carolina Rules of Civil Procedure or any provision of South Carolina or federal law.... (Emphasis added.)

ORS contends that once a matter is docketed and contested, it becomes a contested case proceeding and any conflict surrounding whether a document should be granted confidential treatment is not governed by S.C. Code Ann. 58-4-55(C). Because the Company sought to withhold the PPA amendments from the public pursuant to FOIA and a FOIA request has been made regarding these PPA amendments, ORS argues FOIA governs this situation.

According to ORS, even if the Commission decides that S.C. Code Ann. 58-4-55(C) applies to this situation, FOIA ultimately governs the ability of the Commission to withhold this document from the public. Pursuant to S.C. Code Ann. 58-4-55(C), the Company may designate documents as confidential when it has a good faith belief that the documents are entitled to protection under the Rules of Civil Procedure or any federal or state law. The S.C. Rules of Civil Procedure, Rule 41.2, addresses the redaction of confidential information; however, that rule only permits the redactions of certain personal information.³ ORS contends that the information for which the Company seeks protection does not qualify as personal information exempted under S.C. Rule of Civil Procedure 41.2. Furthermore, because the Company sought protection under

³ South Carolina Rule of Civil Procedure Rule 41.2 permits the redaction of “(1) Social Security Numbers, Taxpayer Identification Numbers, Driver’s License Numbers, Passport Numbers or Any Other Personal Identifying Numbers. (2) Names of Minor Children. (3) Financial Account Numbers, Including Any Type of Bank Account Numbers, Personal Identification Number (PIN) Code, or Passwords. (4) Home Addresses of Minors, Sexual Assault and Abuse and Neglect Victims, and Non-Parties. (5) Date of Birth.

FOIA,⁴ ORS contends the Commission must look to FOIA in determining whether the information is entitled to confidential treatment.

According to S.C. Code Ann. § 30-4-40:⁵

1. A public body may but is not required to exempt from disclosure the following information:
 - (5) Documents of and documents incidental to proposed contractual arrangements and documents of and documents incidental to proposed sales or purchases of property; however:
...
(c) confidential proprietary information provided to a public body for economic development or contract negotiations purposes is not required to be disclosed.

While FOIA does not specifically entitle these PPA amendments to protection, it provides that the Commission may exercise its discretion to withhold them from public disclosure, and lays out a test to assist the Commission in exercising its discretion. First, the Commission should consider whether document in question is incidental to a “*proposed* contractual arrangement.” (Emphasis added.) ORS argues that these PPA amendments are not proposed contractual arrangements. In the letter dated October 5, 2017, the Company submitted these PPA amendments only after they had already been fully executed.⁶ The second question the Commission may consider in determining whether to grant confidential treatment is whether the documents contain confidential propriety information provided to a public body for “contract negotiation purposes.”⁷ ORS contends that these PPA amendments would fail this consideration as well. According to ORS, the PPA amendments were submitted to the Commission as final and fully executed amendments

⁴ According to the Company’s October 5, 2017, letters, “DEP respectfully requests that the Commission find pursuant to S.C. Code Ann. § 30-4-40(a) certain provisions of the Amendments are exempt from disclosure under the Freedom of Information Act...”

⁵ S.C. Code Ann. § 30-4-10 states that the chapter shall be known and cited as the “Freedom of Information Act.”

⁶ The PPA amendments attached to the Company’s letters dated October 5, 2017, indicate on the letters’ enclosed redacted PPA amendments execution dates of September 25, 2017, on which the PPA amendments were executed by all parties.

⁷ It should be noted that S.C. Code Ann. § 30-4-40(a)(5)(c) was passed in 1996.

to inform the Commission, and not for contract negotiation purposes. ORS argues that there is therefore insufficient support for a Commission finding that the PPA's are entitled to protection from disclosure under FOIA under either the "contract negotiation purposes" or "proposed contractual arrangement" criteria.⁸

ORS also contends that regardless of the rule the Commission adopts to govern the disclosure of these PPA amendments, the burden of proof on the Company remains the same. According to ORS, the Company, as the party requesting confidentiality, carries the burden of proof to demonstrate that there is a legitimate and compelling reason to withhold the information contained in these PPA amendments from the public. The Company must then additionally demonstrate that this reason outweighs the public interest in having access to the information. According to ORS, because the utility will pass the resulting costs of these PPAs on to ratepayers,⁹ the ratepayers have a compelling interest in being able to view the unredacted PPA amendment. The utility must pay the QF rates at or below the utility's avoided costs¹⁰ for these PPAs.¹¹ Absent the public having the ability to view PPA agreements and amendments, they will have no ability to determine whether an electric utility is complying with Commission and Federal Energy Regulatory Commission requirements or whether the Company negotiated the contracts to the customers' benefit. Therefore, ORS argues, maintaining secrecy of these PPA amendments

⁸ See S.C. Code Ann. §§ 30-4-100 and 30-4-110.

⁹ The costs of a QF PPA are passed from the utility to ratepayers annually in the Annual Fuel Clause proceeding. See S.C. Code Ann. 58-27-865(A) ("The term "fuel cost" as used in this section includes the cost of fuel, cost of fuel transportation, and fuel costs related to purchased power. . . "fuel costs related to purchased power", as used in subsection (A)(1) shall include: . . . avoided costs under the Public Utility Regulatory Policy Act of 1978, also known as PURPA.") and S.C. Code Ann. § 58-27-865(B).

¹⁰ 18 Code Federal Regulations § 292.304.

¹¹ ORS also points out that, while ORS does not believe the release of the PPA amendment would necessarily harm the Company's negotiation position, because the prices paid by the Company are capped at its avoided cost, there is a relatively small window for any negotiation to occur and any harm incurred would be minimal.

weakens the level of accountability desirable for regulated entities and encouraged by the South Carolina General Assembly.

Additionally, ORS pointed out that, subsequent to ORS informing all regulated electric utilities that it would oppose inclusion of costs associated with confidential PPAs from being passed on to ratepayers in May of 2017, South Carolina Electric & Gas Company (“SCE&G”), agreed to the public release of Commission filed PPAs.¹² According to ORS, if the information contained in these PPAs were so important to an electric utility’s negotiating position for future contracts, SCE&G would also be contesting the release of PPAs, and any amendments, in the same manner as has the Company.¹³ ORS argues that the inconsistent positions taken by DEP and SCE&G highlight the fact that withholding the information in PPAs, and any amendments, is actually only a utility preference, and not a compelling need that justifies secrecy from the public.

In response to the Company’s reliance on the confidentiality of coal contracts as justification to grant these PPA amendments confidential treatment, ORS drew a distinction between PPAs with QFs and coal contracts. PPAs with QFs are regulated by both the Commission and FERC in such a way as to prevent open market conditions from occurring. For instance, while DEP may be required to purchase energy produced by a QF, it is only required to pay an amount at or below avoided cost. Furthermore, absent the ability of the QF to transport its power produced to more than one utility, a QF only has one potential purchaser. Whereas, a coal supplier has the option to sell its supply to whichever purchaser makes it the most economically advantageous offer. In this way, coal suppliers compete on an open market, while any opportunity a QF has to negotiate is limited by FERC and the Commission. While ORS does not seek to advantage one

¹² See Commission Docket Nos. 2017-143-E and 2017-186-E for unredacted SCE&G PPA filings.

¹³ ORS also pointed out that Olanta and Dillon also failed to make appearances in this proceeding, which leads one to believe DEP the only party to believe these PPA amendments should be held in secret.

side at the disadvantage of another, it believes that there are sufficient distinctions between a PPA and coal contracts to make the two unanalogous. Because this PPA amendment can be distinguished from coal contracts, ORS contends that the Commission would not deviate from prior rulings if it were to hold here that the PPA amendment should be released to the public. ORS argues that PPA and coal contracts are distinct, and as a result, the Commission can require the release of these PPAs, and amendments, without creating a conflict in prior orders.

Notwithstanding, ORS contends that the Commission must view a contested request for confidentiality based on the specific facts of that case and not rely solely on previous rulings for guidance. *See Heater of Seabrook, Inc. v. PSC*, 332 S.C. 20, 26, 503 S.E.2d 739, 742 (1998) (quoting *Hamm v. PSC*, 309 S.C. 282, 289, 422 S.E.2d 110, 114 (1992) (“[t]he declaration of an existing practice may not be the substitute for an evaluation of the evidence. A previously adopted policy may not furnish the sole basis for the Commission’s action.”)) According to ORS, in each contested proceeding the Commission must analyze whether a party has met its burden of proof regarding any request. Specifically, in this instance, ORS argues that the Commission must balance the interests of the public and the Company, and only withhold the information from the public’s view if the Commission determines that the balance tips in the Company’s favor.

In sum, ORS contends it is better to err on the side of disclosure than secrecy and that when all factors are considered, the Commission should utilize its discretion and deny the Company’s request that these PPA amendments be withheld from the public.

III. DISCUSSION

After a review of the filings and oral arguments as described above, the Commission reaches certain factual and legal conclusions.

Stare Decisis

“An administrative agency is generally not bound by the principle of *stare decisis* but it cannot act arbitrarily in failing to follow established precedent.” 330 Concord St. Neighborhood Ass'n v. Campsen, 309 S.C. 514, 424 S.E.2d 538 (Ct. App. 1992) (See Courtesy Motors Inc. v. Ford Motor Co., 384 S.E.2d 118 (Va. Ct. App. 1989)).

Also, “[t]he declaration of an existing practice may not be the substitute for an evaluation of the evidence. A previously adopted policy may not furnish the sole basis for the Commission’s action.” See Heater of Seabrook, Inc. v. PSC, 332 S.C. 20, 26, 503 S.E.2d 739, 742 (1998) (quoting Hamm v. PSC, 309 S.C. 282, 289, 422 S.E.2d 110, 114 (1992)).

While the Commission understands the value in adhering to prior practice, it must evaluate each contested case considering its individual facts and the arguments set forth by the parties. In many previous instances where the Commission approved confidential treatment of PPAs, no party contested the issue. Likewise, in other cases, the Commission has refused to grant confidential treatment to PPAs where the parties agree to release the PPAs to the public.¹⁴ Because this is a contested issue currently before the Commission, it must take into consideration the facts and arguments currently before it and not approve the request to make the documents public or confidential simply because the Commission has approved those requests previously.

Governing Standard

In this request the Company seeks confidential treatment of two PPA amendments pursuant to FOIA.¹⁵ Upon a review of the Company’s request, the fact that the parties dispute whether the PPA amendment is entitled to confidential protection, and because a FOIA request currently exists

¹⁴ See Commission Docket Nos. 2017-143-E and 2017-186-E.

¹⁵ The commission also notes that in Commission Order Nos. 2016-146 and 2016-147, the Commission granted confidential treatment to the original PPAs under FOIA.

regarding these PPA amendments, along other facts, the Commission finds the Company's request is governed by FOIA.

Statutory Interpretation

"The FOIA provides that any person has a right to inspect or copy "any public record of a public body" unless an exemption listed in § 30-4-40 applies. S.C. Code Ann. § 30-4-30(a)(1991). Under S.C. Code Ann. § 30-4-20(c) (1991), "public record" is broadly defined to include all documentary materials "prepared, owned, used, in the possession of, or retained by a public body" with specific exceptions not applicable here. S.C. Tax Comm'n v. Gaston Coper Recycling Corp., 316 S.C. 163, 166, 447 S.E2d 843, 845 (1994).

In this case, the Company filed with the Commission two fully executed PPA amendments. As a result, the Commission holds that these PPA amendments do not meet the requirements set forth in S.C. Code Ann. § 30-4-40(a)(5)(c). However, as a public body that holds confidential documents, the Commission is still entitled to utilize discretion regarding the release of documents to the public.

Commission Discretion

According to FOIA, "[t]he General Assembly finds that it is vital ... that public business be performed in an open and public manner so that citizens shall be advised of the performance ... of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings." S.C. Code Ann. § 30-4-15 (2015).

“The FOIA serves the important governmental interests of providing transparency in governmental decision-making, preventing fraud and corruption, and fostering trust in government... Furthermore, secret government activity creates fertile ground for fraud and corruption, especially in the area of public expenditures where, without transparency, the public can be kept unaware of misappropriations and conflicts of interest.” Disabato v. S.C. Ass'n of Sch. Adm'rs, 404 S.C. 433, 450, 451, 746 S.E.2d 329, 337 (2013).

Where discussing an award of a contract by a city review committee, the Supreme Court stated, “FOIA was enacted to prevent the government from acting in secret.” Quality Towing v. City of Myrtle Beach, 345 S.C. 156, 163, 547 S.E.2d 862, 865 (2001) (See South Carolina Tax Comm'n v. Gaston Copper Recycling Corp., 316 S.C. 163, 447 S.E.2d 843 (1994)).

“Traditionally, materials filed with Applications at this Commission have been public information unless the Company states a good reason for this Commission to hold otherwise.” Commission Order No. 93-266.

In considering the arguments put forth by both parties, the Commission recognizes the Company’s concern that its negotiation position could be negatively affected by the release of these PPA amendments; however, the costs of the PPA amendment will be borne by the ratepayers and any negative effect on the Company’s negotiating position is significantly mitigated by applicable PURPA QF requirements. Furthermore, SCE&G has been able to negotiate PPAs with entities even though previously executed PPAs between outside entities and SCE&G are public. While the Company showed release of these PPA amendments may decrease the negotiating leverage it has over QFs, as the Commission recognizes the release of any secret information to a counterparty would, the Commission does not believe that the Company would be unable to continue to negotiate and enter viable PPAs. Furthermore, the inherent value the

Company may assign to the information contained in these PPA amendments is not sufficient to outweigh the legitimate and compelling interest the public has to the information. The Commission is of the opinion that the arguments in favor of withholding these PPA amendments from the public do not comport with the spirit and goals set forth in FOIA and holds that the Company failed to carry its burden of proof in showing that the negative impact to the Company's negotiating position resulting from the release of these PPA amendments to the public outweighs the public's interest to the information contained therein.

Confidentiality of Coal Contracts

The Commission holds that the confidentiality of coal contracts and the confidentiality of PPAs, and any amendments thereto, are not analogous. The market conditions surrounding negotiation of coal contracts are so varied from those surrounding PPAs with QFs as to make a comparison between the two inapposite. As a result, the Commission declines to accept the position put forth by the Company, and this Order has no impact regarding the confidentiality of coal contracts.

Finally, the Commission holds that the public must be made aware of misappropriations and potential conflicts of interest. The public's right to know far outweighs the Company's confidential considerations. Therefore, in viewing this case on its merits, and not relying solely on previous practice to dictate future action, the Commission holds that the Company has not met its burden to show that its desire to withhold these PPA amendments from the public constitutes a compelling and legitimate reason such that it outweighs the request of ORS that these PPA amendments be made public.

IT IS THEREFORE ORDERED THAT:

1. The Company's request for confidential treatment of these PPA amendments is hereby denied.
2. This order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

Swain E. Whitfield, Chairman

ATTEST:

Comer H. Randall, Vice Chairman